



FEDERAL ELECTION COMMISSION
Washington, DC 20463

Via Facsimile and First Class Mail
(952) 915-3922

MAR 12 2015

Robert Foehl, Esq.
ACA International
4040 West 70th Street
Minneapolis, Minnesota 55435

RE: MUR 6922
ACA International
ACPAC ACA International Political
Action Committee and Rae Ann
Bevington in her official capacity as
treasurer

Dear Mr. Foehl:

On January 12, 2012, Adam Peterman, the previous designated treasurer for ACPAC ACA International Political Action Committee notified the Federal Election Commission (the "Commission"), in a *sua sponte* submission, of the possibility that ACA International and ACPAC ACA International Political Action Committee and Adam Peterman in his official capacity as treasurer ("ACPAC") may have violated certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act") in connection with activity between January 2010 and February 2011.

After reviewing the submission, the Commission found reason to believe, on March 3, 2015, that ACA International violated 52 U.S.C. §§ 30118(b) and 30122 (formerly 2 U.S.C. §§ 441b(a) and 441f) and 11 C.F.R. §§ 110.4(b)(1)(i) and 114.2(b). The Commission also found reason to believe that ACPAC violated 52 U.S.C. §§ 30104(b), 30118(b), and 30122 (formerly 2 U.S.C. §§ 434(b), 441b(a), and 441(f)) and 11 C.F.R. § 110.4(b)(1)(iv) and 114.2(d). Finally, the Commission voted to take no action as to ACPAC with regard to the possible inaccurate reporting as a result of the misappropriation of funds by Marilyn Cerini, former ACA employee. Enclosed is the Factual and Legal Analysis that sets forth the basis for the Commission's determination.

Please note that you have a legal obligation to preserve all documents, records and materials relating to this matter until such time as you are notified that the Commission has closed its file in this matter. See 18 U.S.C. § 1519.

In order to expedite the resolution of this matter, the Commission has authorized the Office of the General Counsel to enter into negotiations directed towards reaching a conciliation agreement in settlement of this matter prior to a finding of probable cause to believe. Pre-probable cause conciliation is not mandated by the Act or the Commission's regulations, but is a voluntary step in the enforcement process that the Commission is offering to your clients as a way to resolve this matter at an early stage and without the need for briefing the issue of whether or not the Commission should find probable cause to believe that your clients violated the law.

If your clients are interested in engaging in pre-probable cause conciliation, please contact Kimberly Hart, the attorney assigned to this matter, at (202) 694-1650 or (800) 424-9530, within seven days of receipt of this letter. During conciliation, you may submit any factual or legal materials that you believe are relevant to the resolution of this matter. Because the Commission only enters into pre-probable cause conciliation in matters that it believes have a reasonable opportunity for settlement, we may proceed to the next step in the enforcement process if a mutually acceptable conciliation agreement cannot be reached within sixty days. *See* 52 U.S.C. § 30109(a), 11 C.F.R. Part 111 (Subpart A). Conversely, if your clients are not interested in pre-probable cause conciliation, the Commission may conduct formal discovery in this matter or proceed to the next step in the enforcement process. Please note that once the Commission enters the next step in the enforcement process, it may decline to engage in further settlement discussions until after making a probable cause finding.

In the meantime, this matter will remain confidential in accordance with 52 U.S.C. §§ 30109(a)(4)(B) and 30109(a)(12)(A) (formerly 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A)) unless you notify the Commission in writing that you wish the matter to be made public. We look forward to your response.

On behalf of the Commission,


Ann M. Ravel
Chair

Enclosures
Factual and Legal Analysis

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1 **FEDERAL ELECTION COMMISSION**
2 **FACTUAL AND LEGAL ANALYSIS**

3 **MUR 6922**

4
5 **RESPONDENTS:**

ACA International

7 ACPAC ACA International Political Action
8 Committee and Rae Ann Bevington in her
9 official capacity as Treasurer

10
11 **I. INTRODUCTION**

12
13 This matter originated with a *sua sponte* submission made to the Federal Election
14 Commission ("the Commission") by ACA International ("ACA"), a non-profit corporate trade
15 association, and ACPAC ACA International Political Action Committee ("ACPAC"), its
16 separate segregated fund ("SSF").

17 **II. FACTUAL SUMMARY**

18 **A. Background**

19 ACA is an incorporated, not-for-profit trade association servicing businesses and
20 individuals in the credit and collection industry.¹ ACPAC is its SSF, registered with the
21 Commission as an unauthorized, qualified, non-party committee, and Rae Ann Bevington is
22 ACPAC's current Treasurer (collectively, the "Committee"). Jean Cottington was the treasurer
23 for ACPAC from April 15, 2008 to April 25, 2011, the period at issue.² In addition to her former
24 role as Treasurer, Cottington was ACA's Director of Legislative and Grassroots Affairs until she

¹ See <http://www.acainternational.org/> (last visited on Apr. 17, 2014).

² Between Bevington and Cottington, Patrick Morris served as ACPAC's Treasurer from April 23, 2012, to June 28, 2012, Adam Peterman served in that role from September 15, 2011, to April 23, 2012, and Valerie Hayes was Treasurer for ACPAC from April 25, 2011 to September 15, 2011.

1 was dismissed in April 2011 for failing to adequately supervise ACPAC's filings with the
2 Commission.³

3 Michael Henke was ACA's Vice President of Finance from 2004 until he was dismissed
4 in April 2011 in connection with ACA's internal inquiry concerning this matter.⁴ In April 2008,
5 ACPAC designated Henke as its Assistant Treasurer with the Commission.⁵ In a deposition
6 taken in connection with Cottington's civil employment action, Henke testified that he was
7 unaware ACPAC had so designated him.⁶ Nonetheless, Henke acknowledged that he was
8 responsible for oversight of all financial accounting, but could not specifically recall whether he
9 consulted with ACPAC Treasurer Cottington prior to engaging in significant actions involving
10 ACPAC's bank account.⁷ The available information indicates that Henke denied having
11 responsibility for ACPAC's reporting obligations with the Commission.

³ On June 13, 2011, Cottington filed a wrongful termination lawsuit against ACA. See Cottington Civil Complaint, *Cottington v. ACA Int'l*, Civ. No. 27-11-12748 (June 13, 2011) (4th Judicial Dist. Ct., Hennepin County, MN) ("Cottington Civil Complaint"); Amended Civil Complaint, *Cottington v. ACA, Int'l*, Civ. No. 27-11-12748 (January 19, 2012) (4th Judicial Dist. Ct., Hennepin County, MN) ("Cottington Amended Civil Complaint"). The District Court judge issued a protective order on August 5, 2011. See Cottington Resp. (Feb. 17, 2012) (attaching Stipulation for Protective Order and Proposed Protective Order (filed on Aug. 8, 2011)). As basis for her suit, among other things, Cottington claimed that she was unaware that Henke had transferred corporate funds to ACPAC or that ACPAC's disclosure reports consequently contained false information. Cottington Amended Civil Compl. ¶¶ 8, 15-17, 21-23, 23-25.

⁴ The Submission did not provide a complete account of Henke's activities in connection with the transfer of funds from ACA to ACPAC. See Submission at 3. ACPAC's counsel has represented that the Committee was hampered in its effort to make a full submission by the departure of many of the individuals with personal knowledge of relevant facts. After it made the submission, however, it obtained Henke's deposition testimony in connection with Cottington's civil action and has since provided additional information through counsel concerning Henke's transfer of funds from ACA to ACPAC.

⁵ See ACPAC, Amended Statement of Organization (Apr. 15, 2008); see also Cottington Civ. Compl. ¶ 18 (June 13, 2011); E-Mail to Kimberly Hart, FEC, from Nancy Hylden, Esq., ACPAC Counsel, dated May 16, 2012 ("Hylden May 16, 2012, E-Mail") (referring to Henke as ACPAC's Assistant Treasurer).

⁶ See Hylden June 11, 2012 E-Mail (attaching Dep. of Michael Henke at 53:21-:25, 54:1-:2 (Dec. 8, 2011) ("Henke Dep.")).

⁷ See, e.g., Henke Dep. at 44:15-:22, 76:6-:20, 79:8-:18.

1 Marilyn Cerini was ACA's Assistant Controller from March 2003 until her termination
2 on September 29, 2010.⁸ In early 2010, among other things Cerini was responsible for certain
3 internal bookkeeping functions related to the ACPAC bank account.⁹ After her termination, in
4 October 2010, ACA discovered that between January and May 2010, Cerini had improperly
5 diverted \$2,950 from the ACPAC account to personal accounts under her control.¹⁰ The
6 Committee reported the matter to local law enforcement authorities, and Cerini was charged with
7 felony theft.¹¹

8 **B. ACA's Contributions to ACPAC Through Fictitious Disclosures**

9 The discovery of Cerini's theft led Henke and other members of the accounting
10 department to conduct a more comprehensive review of the Committee's records, which
11 suggested that ACPAC's ledger reflected a surplus of \$23,419 over ACPAC's bank balance.¹²
12 Apparently to bring the books into balance, ACPAC's ledger subsequently included an
13 October 31, 2010, accounting entry reducing the ledger balance by \$23,419.¹³ Neither the
14 Submission nor any other information in the record indicates who made that entry.¹⁴
15 Notwithstanding that accounting reduction, on November 12, 2010, Henke sought to address the
16 perceived imbalance by transferring \$23,419 by wire from ACA's general treasury account to

⁸ Submission at 1.

⁹ *Id.* at 2.

¹⁰ *Id.*

¹¹ *Id.* at 1-2, Exs. A, B. Cerini's criminal case ultimately was diverted to an alternative program for first-time property offenders, and she was required to pay restitution to ACPAC. *Id.*

¹² Henke Dep. at 73:11-25, 74:1-25, 75:1-25.

¹³ Submission at 3.

¹⁴ *Id.*

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1 ACPAC's bank account.¹⁵ The Submission states that, although the "apparent surplus"
2 instigated the transfer of funds from ACA to ACPAC, they cannot explain the apparently
3 duplicative efforts to resolve the same imbalance.¹⁶

4 In his subsequent testimony in the Cottingham civil action, Henke claimed that he
5 transferred the \$23,419 from ACA's corporate account on the advice of Ray Mularie, who was
6 hired to reconcile ACA's accounts and had concluded that ACPAC's funds had mistakenly been
7 deposited into ACA's account.¹⁷ Moreover, Katelyn Pearsall, another ACA employee who
8 Henke supervised, asserted in a sworn statement provided to the Commission in conjunction with
9 the Submission that she personally witnessed Henke access ACA's account through its bank's
10 website and then transfer the funds to ACPAC.¹⁸ Pearsall further stated that she understood,
11 based on what Henke told her, that the purpose of the transfer was to reconcile ACPAC's bank

¹⁵ Henke Dep. at 74:10-25; 75:1-25.

¹⁶ Submission at 3 n.5; *see also* See E-Mail from Nancy Hylden, ACPAC Counsel, to Kimberly Hart, FEC (July 13, 2012) ("Hylden July 13, 2012, E-Mail").

¹⁷ Henke Dep. at 75:4-25. Counsel for the Committee explained that Ray Mularie was a temporary accountant who worked with ACA from late October 2010 through early December 2010 and asserts that the Committee has had no contact with Mularie since that time. *See* Hylden July 13, 2012 E-Mail. Mularie worked primarily on reconciling bank and cash accounts. *Id.* The Committee asserts that Mularie had no special knowledge of the Act or Commission regulations and was unlikely to have been aware of restrictions relating to commingling corporate treasury funds and PAC funds. *Id.* Counsel states that ACA did not enter into a written contract with Mularie and that the source of its information concerning his involvement is the recollection of other staff employees. *Id.*

Counsel further states that the three members of the accounting department who had access to the website through which the wire transfer would have originated were Henke, Pam Butera (Accounting Coordinator), and Katelyn Pearsall (Accounting Assistant). *See* E-Mail from Nancy Hylden, ACPAC, to Kimberly Hart, FEC (May 16, 2012) ("Hylden May 16, 2012 E-Mail"). Therefore, it appears that Mularie, a temporary employee, lacked the access necessary to transfer the funds on his own.

¹⁸ Aff. of Katelyn Pearsall at 2 (June 15, 2012) ("Pearsall Aff.") (attached to E-Mail from Nancy Hylden, ACPAC Counsel to Kimberly Hart, FEC (June 15, 2012).

1 account balance with the cash-on-hand balance reported to the Commission in connection with
2 ACPAC's disclosure reports, which appeared to be overstated by the same amount.¹⁹

3 According to the Submission and supporting statements, on November 12, 2010, the date
4 of the transfer from ACA to ACPAC, Henke also instructed Pearsall and Michelle Andrew —
5 another accounting department employee who Henke supervised — to identify ACPAC donors
6 falsely as the original source of the funds that ACA transferred to ACPAC.²⁰ In their statements,
7 Pearsall and Andrew both contend that Henke directed them to create those false records.²¹ They
8 explain that Henke instructed them first to identify ACPAC contributors who had not met their
9 annual aggregate contribution limit of \$5,000, and then to record fictional contributions from
10 regular or frequent contributors on that list in amounts that would not exceed those individuals'
11 annual aggregate contribution limits.²²

12 Andrew and Pearsall falsified seven such contributions in the manner Henke described,
13 accounting for \$22,399 in alleged contributions along with an eighth contribution for \$250
14 falsely attributed to ACPAC contributor Debra Bates days later, but the total amount fell short of
15 the \$23,419 transferred from ACA by \$770.²³ Consequently, Andrew and Pearsall recorded an

¹⁹ *Id.*

²⁰ Submission at 3-4; Aff. of Michelle Andrew at 4-6 (June 15, 2012) ("Andrew Aff.") (attached to E-Mail from Nancy Hylden, ACPAC Counsel to Kimberly Hart, FEC (June 15, 2012); Pearsall Aff. at 4. Pam Butera, who also worked under Henke's supervision, stated in a sworn statement provided to the Commission in connection with the Submission that she was not aware of or involved in Henke's November 10, 2010, transfer. Aff. of Pam Butera at 2-3 (June 21, 2012) ("Butera Aff.") (attached to E-Mail from Nancy Hylden, ACPAC Counsel to Kimberly Hart, FEC (June 21, 2012).

²¹ Andrew Aff. at 4-5; Pearsall Aff. at 4.

²² Andrew Aff. at 4; Pearsall Aff. at 4.

²³ Submission at 3-4; Hylden July 13, 2012, E-Mail (explaining the circumstances of the creation of the eighth contribution).

1 additional \$770 in the form of unattributed cash contributions to balance the figures.²⁴ In
2 addition, several months later, Andrew permitted her own name to be used in connection with
3 another \$250 contribution that was unrelated to the scheme to create an accounting justification
4 for the \$23,419 transfer from ACA to ACPAC.²⁵

5 In his deposition, Henke acknowledged his responsibility for associating contributor
6 names with false contributions. He testified that he instructed Pearsall and Andrew to
7 "temporarily assign names" to the \$23,419 in contributions transferred to ACPAC's account for
8 disclosure reporting purposes.²⁶ He explained that he sought to "buy . . . time to get the bank
9 accounts reconciled and these [reports] were going to be re-filed anyway."²⁷ He also admitted
10 that he was aware that false contributions would consequently be included among the
11 Committee's disclosures in a report filed with the Commission, but anticipated disclosing
12 accurate information later in the reports.²⁸

²⁴ *Id.* at 4. ACPAC states that its internal contribution tracking software program indicates that the cash contributions were received on November 16, 2010. *Id.* The \$770 in cash contributions were not recorded in the ACPAC ledger, however, and no correlating cash contributions were deposited into the ACPAC bank account. *Id.*

²⁵ Andrew Aff. at 4-5. Henke and his staff discovered a \$250 contribution made in October 2010 by an undesignated contributor. Henke Dep. at 43:13-19. Henke stated that they "spent days trying to figure out who that contribution was from." Henke Dep. at 43:18-19. Andrew similarly stated that "Mike Henke, Katelyn, and I scoured accounting records looking for an individual's name to tie to the \$250, and Mike Henke told me to use my name." See Cottingham Amended Resp. (attaching excerpted copy of Deposition of Michelle Andrew at 48:16-19 (Dec. 7, 2011) ("Andrew Dep.")). Andrew states that "she did not say no" to Henke's suggestion that she use her name but responded "I said fine; what should I do." Andrew Dep. at 108:12-13. An Amended 2010 Pre-General Report filed February 7, 2011, itemized that \$250 contribution in Andrew's name. See Amended 2010 Pre-General Report (Feb. 7, 2011). ACPAC did not include any information regarding this activity in its Submission. See Submission, generally. OGC became aware of the \$250 contribution through our review of documents Cottingham provided in connection with her civil employment action. See, e.g., Andrew Dep. at 48:1-25; Cottingham Amended Resp. (Feb. 21, 2012) (attaching excerpted copy of Deposition of Kathleen Molitor at 37:10-21 (Dec. 20, 2011) ("Molitor Dep.")). According to counsel, ACA only became aware of Andrew's actions concerning this unrelated \$250 contribution after ACA made its Submission to the Commission. See Hylden July 13, 2012 E-Mail.

²⁶ Henke Dep. at 94:18-25, 95:1-25, 96:1-6.

²⁷ *Id.* at 94:23-25, 95:1-3.

²⁸ *Id.* at 94:18-25, 95:1-25, 96:1-3.

1 In addition to seeking to disguise the true nature of the transfer from ACA to ACPAC
2 generally, Henke also sought to conceal the activity internally. According to Andrew, Henke
3 instructed other staff members, including Andrew and Pearsall, not to discuss or reveal to
4 Cottington details related to the prohibited transfer.²⁹ Andrew testified that Henke consistently
5 directed them throughout the process "don't tell Jean about this," or "we can't tell Jean" about
6 the falsified contributions.³⁰ Henke conceded as much in his testimony, stating that he did not
7 inform Cottington about the transfer and instructed Andrew not to do so either until they "got it
8 figured out."³¹

9 On December 2, 2010, then-Treasurer Cottington filed the original 2010 Post-General
10 Election Report that itemized \$22,649 in contributions that Henke and his staff fabricated, as
11 well as \$770 in cash contributions among other unitemized cash contributions disclosed in that
12 filing.³²

13 After Cottington filed the 2010 Post-General Report, Henke determined that the
14 perceived imbalance in ACPAC's books stemmed from an accounting irregularity and that no
15 \$23,419 shortfall ever existed.³³ Thus, to remedy the discrepancy in the books that resulted from
16 the previous "remedial" transfer, on January 20, 2011, Henke directed staff to issue a check from

²⁹ See Andrew Dep. at 106:7-:25, 107:1-:5 (explaining how Henke specifically instructed Andrew and Pearsall on numerous occasions not to discuss or reveal to Cottington details related to the records in the Committee's disclosure reports).

³⁰ *Id.*

³¹ Henke Dep. at 79:8-:25, 80:1-:13.

³² Submission at 4; see ACPAC, 2010 Post-General Report (Dec. 2, 2010).

³³ Submission at 4; see Henke Dep. at 75:4-:8. According to Henke, when it became apparent that ACPAC could not match any incoming contributions to the transfer amount, he had no choice but to reverse the transfer. *Id.* at 75:4-:8. Henke stated that he must have informed other ACA corporate officers of the transfer, but could not identify any person whom he notified. *Id.* at 79:16-:25, 80:1-:2.

1 ACPAC to ACA payable in the amount of \$23,419 and backdated to November 12, 2010 — the
2 date of the initial transfer.³⁴ The correlating ACPAC ledger entry reflecting that return of funds
3 also was backdated to November 12, 2010.³⁵

4 On January 31, 2011, after Henke reversed the initial unlawful transfer, Cottingham filed
5 the 2010 Year-End Report for ACPAC, which falsely described the return of those funds to ACA
6 as "Refunds of Contributions to Persons Other Than Political Committees" in the amount of
7 \$23,419 to the contributors who Henke and his staff had associated with the spurious
8 contributions.³⁶ In fact, ACPAC issued no such refunds to any of the putative contributors. The
9 available information indicates that Cottingham in her official capacity as Treasurer of ACPAC
10 filed the original 2010 Post-General and 2010 Year-End Reports that inaccurately described the
11 transfers of ACA's corporate funds to ACPAC and back as contributions received from and
12 refunded to the falsely identified individuals. Further, the available information indicates that
13 Henke concealed information from Cottingham that would have alerted her to the falsity of those
14 reports.

15 On February 7, 2011, the Committee amended its 2010 Post-General Report to reflect
16 seven of the eight falsified contributors that the original 2010 Post-General Report had
17 identified.³⁷ Also on February 7, 2011, the Committee filed an Amended 2010 Year-End Report
18 disclosing the refund of all eight falsified contributors totaling \$22,649 as well as the \$770 in

³⁴ Submission at 4; see Hylden July 13, 2012 E-Mail. Pam Butera, another Henke subordinate on the accounts payable staff of ACA, stated in a statement that Henke instructed her in January 2011 to issue a check from ACPAC to ACA backdated to November 12, 2010. See Butera Aff. at 2.

³⁵ Submission at 4.

³⁶ The remaining \$770 in supposed cash contributions would not have been reflected as refunds to specific individuals but rather as unitemized refunds of contributions.

³⁷ ACPAC, Amended 2010 Post-General Report (Feb. 7, 2011).

1 cash contributions.³⁸ The available information indicates that Henke filed the February 7, 2011
2 Amended 2010 Post-General and Year-End Reports electronically on his own initiative as the
3 Assistant Treasurer of ACPAC using Cottington's Commission password and without notifying
4 her or providing them to her for review prior to filing them with the Commission. Henke
5 disputes that claim, asserting that Dan Puhl — a temporary consultant hired to assist the
6 Committee in reconciling its accounts³⁹ — filed them.⁴⁰

7 Cottington asserted in her civil action that her role as Treasurer was limited to ensuring
8 that the Committee's reports with the Commission were properly filed.⁴¹ She claimed that when
9 ACA retained her, ACA executives informed her that Henke and his staff would be responsible
10 for assembling and preparing the reports for filing.⁴² She further contended that she believed

³⁸ ACPAC, Amended 2010 Year-End Report (Jan. 31, 2011). The Submission does not explain, and we are unable to determine, why the February 7, 2011, Amended 2010 Post-General Report failed to include an alleged refund of one of the false contributions — a \$2,500 contribution falsely attributed to Darin Bunton — or \$100 of the previously reported cash contributions, while the Amended 2010 Year-End Report reflects refunds of the entire \$23,419 amount of the transfer.

³⁹ See Henke Dep. 42:7-13, 82:3-7; Cottington Amended Civil Complaint ¶ 18. The Committee indicates that, based on a review of Henke's e-mails, ACA's first contact with Puhl appears to have been on October 13, 2010, and that he visited ACA's main office on several occasions afterwards. Hylden July 13, 2012 E-Mail. The Committee has not had any contact with Puhl since mid-March 2011. *Id.*

⁴⁰ Henke Dep. at 84:16-25, 85:1-23. Further, Henke says that they did not show their work to Cottington and that Puhl filed the amended reports using Cottington's signature. *Id.* In assessing these claims, the Committee reviewed various Henke e-mails that suggested that Puhl may have assisted with the preparation of ACPAC's disclosure reports and may have submitted some of them using Cottington's password. Hylden July 13, 2012 E-Mail. But because neither Cottington, Henke, nor Puhl remained employed by ACA when it conducted its internal review, the Committee could not conclude with certainty whether Puhl was otherwise involved in the effort to falsify contribution records or in fact filed the amended reports, as Henke contends. *Id.* Even if Puhl filed those amended disclosure reports as Henke claims, he would not be liable under the Act for a reporting violation because he was not a treasurer. Further, whatever Puhl's role in filing the amendments on February 7, 2011, the available information indicates that Henke directly authorized and participated in the effort to conceal the illegal transfers of funds between ACA and ACPAC as false contributions and false refunds to contributors.

⁴¹ Cottington Amended Civil Complaint ¶¶ 7-8.

⁴² Cottington Civil Complaint (June 13, 2011) ¶ 7; Cottington Resp. (attaching Memorandum of Law In Support of Motion for Partial Summary Judgment on Whistleblower Claim, Civ. File No. 27-CV-11-12748 (Feb. 13, 2012) (4th Judicial Dist. Ct., Hennepin County, MN) ("Cottington Partial Summary Judgment Memo") (with attached excerpted copy of Deposition of Jean Cottington at 30:1-25, 31:1-25) (Oct. 18, 2011) ("Cottington Dep.")).

1 Henke was suited to that role, given his finance and accounting background and his access to the
2 Committees' financial information as the Assistant Treasurer and as Vice-President of Finance
3 for ACA.⁴³ According to Cottington, ACA executives assured her that she could rely upon the
4 work of the staff, and particularly Henke.⁴⁴ Because of this arrangement, Cottington asserts that
5 she had limited access to the accounting department's documents and was not shown "formal
6 records of deposits or things like that."⁴⁵

7 Cottington indicated that she first became aware of the details of Henke's conduct from
8 Andrew in an April 2011 meeting.⁴⁶ Andrew's deposition testimony is consistent with that
9 assertion.⁴⁷ After speaking with Andrew, Cottington arranged to have a conference call with
10 ACA President Martin Sher and ACA Vice-President Tom Stockton.⁴⁸ That call was scheduled
11 for April 14, 2011, but Cottington was unavailable and asked her husband to "brief" Sher and
12 Stockton about the false reports filed with the Commission.⁴⁹ On April 15, 2012, in a

⁴³ Cottington Dep. at 30:1-:25, 31:1-:25.

⁴⁴ *Id.*

⁴⁵ *Id.* at 31:21-:23.

⁴⁶ Cottington Amended Civil Complaint ¶ 22. It was also during this meeting that Cottington learned that Henke had directed staff members, including Andrew, not to discuss any details of the meeting at which Cerini's thefts were discussed. Andrew Dep. at 118:19-:25. Henke claimed that although he did not recall being told not to discuss the matter with Cottington, he inferred from Cottington's absence at the Cerini meeting that he should not share the information with her. Henke Dep. at 37:11-:25, 38:1-:8. According to Andrew, she specifically asked Henke afterwards whether Cottington should be informed about the details of the meeting given her position as Treasurer, and Henke replied in the negative. Andrew Dep. at 118:19-:25, 119:1-:5. Andrew also informed Cottington during this discussion that Henke had instructed her and Pearsall not to disclose the falsified contribution scheme to Cottington as well. See Cottington Amended Resp. at 3; Cottington Civil Compl. ¶ 18.

⁴⁷ Andrew Dep. at 35:17-:25, 36:1-:25, 37:1-:20.

⁴⁸ Cottington Civil Compl. ¶ 20.

⁴⁹ *Id.*, ¶ 21. Cottington contended that Sher and Stockton agreed that "there was a problem and recommended that because Jean Cottington had been deprived of any control over the process she should step back as Treasurer, and allow Mike Henke to take over responsibility." *Id.*

1 conversation with Stockton, Cottington also expressed concern about her ability to continue to
2 serve effectively as Treasurer, given the situation and her "lack of access to the actual books."⁵⁰

3 On April 18, 2011, ACA terminated Cottington for her inadequate supervision of
4 ACPAC's FEC filings, specifically for her failure to participate in the January and February
5 reconciliation process and for allowing FEC reports to be filed without reviewing them.⁵¹ After
6 Cottington's termination in April 2011, Valerie Hayes, the then-General Counsel of ACA,
7 assumed the role of Treasurer for ACPAC and initiated an internal review of ACA's accounting
8 practices.⁵² In June 2011, Hayes filed amended 2010 Post-General Reports and 2010 Year-End
9 reports, deleting those contributions and disbursements associated with the \$23,419 discrepancy
10 "once she found no evidence that these contributions or disbursements had been made."⁵³

11 **C. Cerini's Theft**

12 In addition to addressing Henke's activities in connection with the illegal transfer of
13 ACA funds and consequent ACPAC false reporting, the Submission also addresses certain
14 incorrect disclosure reports ACPAC filed relating to a theft of its funds by another former
15 employee, Marilyn Cerini.⁵⁴ Cerini was ACA's Assistant Controller from March 2003 until her

⁵⁰ *Id.*, ¶ 22.

⁵¹ Hylden May 16, 2012 E-Mail.

⁵² Submission at 5. ACPAC did not file an amended Statement of Organization with the Commission reflecting the change in treasurer from Cottington to Hayes. The Act requires that any change in information previously submitted in a Statement of Organization be reported in accordance with 2 U.S.C. § 432(g) no later than 10 days after the date of the change. 52 U.S.C. § 30103(c) (formerly 2 U.S.C. § 433(c)). Although the Committee failed to comply with that obligation, the Commission decided to take no action regarding the Committee's apparent oversight.

⁵³ Submission at 5.

⁵⁴ *Id.* at 1-3.

1 termination on September 29, 2010.⁵⁵ In early 2010, Cerini became responsible for processing
2 and depositing contributions and disbursements for ACPAC and for certain bookkeeping
3 functions.⁵⁶ She was then terminated in September 2010.⁵⁷ After Cerini's termination, ACPAC
4 discovered that between January and May 2010, Cerini had transferred without authorization
5 \$2,950 from ACPAC's online PayPal account to her credit card account.⁵⁸ ACPAC failed to
6 disclose the transfers in its original 2010 reports, but has since amended the relevant reports with
7 RAD's assistance.⁵⁹

8 D. Remedial Measures

9 ACPAC represents that it has instituted several safeguards designed to prevent further
10 unlawful transfers from ACA, including (1) requiring the accounting staff to conduct monthly
11 reviews with the Custodian of Records and verify that the activity is appropriate; (2) requiring
12 the accounting department and treasurer or assistant treasurer to review and approve any
13 amendment or correction to the ACPAC ledger and Commission disclosure reports, which must

⁵⁵ *Id.* at 1.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 1-2. Specifically, she transferred \$450 on January 5, 2010, \$500 on April 13, 2010, and \$2,000 on May 16, 2010. *Id.*; see Hylden June 11, 2012, E-Mail. In connection with the Cottingham civil action, Henke testified that Cerini may have been responsible for some of the inaccuracies in the records of ACA and ACPAC. Henke Dep. at 73:23-:25, 74:1-:22.

⁵⁹ See ACPAC, Amended 2010 February Monthly Report (Feb. 22, 2012) (removing \$450 Cerini embezzlement related item); ACPAC, Amended 2010 May Monthly Report (June 28, 2012) (removing \$500 Cerini embezzlement related item); ACPAC, Amended 2010 June Monthly (Mar. 22, 2012) (adding unauthorized credit card refund totaling \$5 [if \$5 need not include the .00] related to Cerini embezzlement); ACPAC, Amended 2010 Post General Report (June 28, 2012) (adding \$23,419 unlawful transfer); ACPAC, Amended 2010 Year-End Report (June 28, 2012) (adding \$23,419 unlawful transfer). On September 16, 2011, the Committee also amended its 2010 February Monthly and June Monthly reports to include Cerini's theft as Line 15 "offsets to operating expenditures," along with other corrections to reconcile the 2010 reports. Submission at 3. In addition, the Committee noted at that time that it had not yet amended its reports to include the April 14, 2010 misappropriation. *Id.* at 3. Ultimately, with RAD's assistance ACPAC amended the 2010 February Monthly, May Monthly, June Monthly Reports, Pre-General, Post-General, and Year-End Reports, all filed with the Commission on June 28, 2012.

1 be fully explained in writing; (3) requiring monthly reconciliation of the ACPAC ledger and
2 Commission disclosure reports; (4) developing an internal education program to inform
3 accounting staff and all individuals providing administrative support and oversight of the laws
4 pertaining to federal PAC activity and its protocols; and (5) requiring the treasurer and custodian
5 of records to attend Commission training.⁶⁰

6 ACPAC also claims that it has implemented controls to prevent the misappropriation of
7 its funds, including (1) requiring confirmation and approval of disbursements by both the
8 treasurer and assistant treasurer, as well as a manager in ACA's accounting department;
9 (2) prohibiting disbursements from ACPAC using credit card transactions; and (3) requiring that
10 disbursements from ACPAC be made by check, approved by two individuals, and signed by the
11 treasurer or assistant treasurer or other pre-authorized signatories.⁶¹

12 III. LEGAL ANALYSIS

13 A. Prohibited Contributions, Contributions in the Names of Others, and the 14 Reporting Obligations of Committees and Treasurers

15 The Act prohibits corporations from making contributions to a federal political
16 committee (other than independent expenditure-only political committees)⁶² and further prohibits
17 any officer of a corporation from consenting to any such contribution by the corporation.⁶³
18

⁶⁰ Submission at 5-6.

⁶¹ *Id.* at 3.

⁶² See, e.g., Advisory Op. 2010-11 (Commonsense Ten) (concluding that corporations and unions may make unlimited contributions to independent-only political action committees because "independent expenditures do not lead to, or create the appearance of *quid quo pro* corruption") (citing *Citizens United v. FEC*, 558 U.S. 310, 359 (2010)) (emphasis in original).

⁶³ 52 U.S.C. § 30118(a) (formerly 2 U.S.C. § 441b(a)); 11 C.F.R. § 114.2(b), (e). On September 1, 2014, the Act was transferred from Title 2 to new Title 52 of the United States Code. A corporation's solicitation of its executive and administrative personnel for contributions to its separate segregated fund is not considered a

1 Likewise, a political committee is prohibited from knowingly receiving prohibited
2 contributions.⁶⁴ The Act also provides that “no person shall make a contribution in the name of
3 another person.”⁶⁵ That prohibition extends to knowingly permitting one’s name to be used to
4 effect the making of a contribution in the name of another or, under the Commission’s
5 implementing regulation, to knowingly helping or assisting “any person in making a contribution
6 in the name of another.”⁶⁶ The Commission has explained that the provisions addressing those
7 who knowingly assist a conduit-contribution scheme apply to “those who initiate or instigate or
8 have some significant participation in a plan or scheme to make a contribution in the name of
9 another.”⁶⁷

10 Political committees must regularly submit to the Commission reports that accurately
11 disclose their receipts, disbursements, and cash-on-hand balances.⁶⁸ Among other requirements,
12 those disclosure reports must specifically identify the cash-on-hand balance at the beginning of
13 the reporting period, the total amount of receipts, and the total amount of disbursements,
14 including the name and address of each person to whom an expenditure exceeding \$200 is made,
15 along with the date, amount, and purpose of the particular expenditure.⁶⁹ The committee’s

contribution or expenditure. *See id.* § 30118(b)(2)(C)) (formerly § 441b(b)(2)); 11 C.F.R. §§ 114.1(a)(2)(iii), 114.7(a).

⁶⁴ 52 U.S.C. § 30118(a) (formerly 2 U.S.C. § 441b(a)); 11 C.F.R. § 114.2(d).

⁶⁵ 52 U.S.C. § 30122 (formerly 2 U.S.C. § 441f); 11 C.F.R. § 110.4(b)(1)(i).

⁶⁶ 11 C.F.R. § 110.4(b)(1)(ii), (iii).

⁶⁷ Explanation & Justification for 11 C.F.R. § 110.4, 54 Fed. Reg. 34,105 (Aug. 17, 1989) (“E&J”).

⁶⁸ 52 U.S.C. § 30104(b)(1)-(4) (formerly 2 U.S.C. § 434(b)(1)-(4)); 11 C.F.R. § 104.3(a)(1), (b).

⁶⁹ 52 U.S.C. § 30104(b)(1), (2), (4), (5), (6)(B) (formerly 2 U.S.C. § 434(b)(1), (2), (4), (5), (6)(B)).

1 treasurer must sign each disclosure report that the committee files with the Commission.⁷⁰ In
2 addition, the Commission has determined that it may deem a current or former treasurer to be
3 party to an enforcement action in her personal capacity where the available information suggests
4 the treasurer “knowingly and willfully violated an obligation that the Act or regulations
5 specifically impose on a treasurer or where a treasurer recklessly failed to fulfill duties imposed
6 by law, or where the treasurer has intentionally deprived himself or herself of operative facts
7 giving rise to the violation.”⁷¹

8 Finally, the Act prescribes additional monetary penalties for violations that are knowing
9 and willful.⁷² A violation of the Act is knowing and willful if the “acts were committed with full
10 knowledge of all the relevant facts and a recognition that the action is prohibited by law.”⁷³ But
11 this does not require proving knowledge of the specific statute or regulation the respondent
12 allegedly violated.⁷⁴ Instead, it is sufficient to demonstrate that a respondent “acted voluntarily
13 and was aware that his conduct was unlawful.”⁷⁵ This may be shown by circumstantial evidence

⁷⁰ *Id.* § 30104(a) (formerly § 434(a)).

⁷¹ See Statement of Policy Regarding Treasurers in Enforcement Proceedings, 70 Fed. Reg. 3, 4 (Jan. 3, 2005) (the “Treasurer Policy”); see also Commission Certification ¶ 3, MUR 5652 (Terrell for Senate) (Apr. 5, 2005) (finding reason to believe assistant treasurer violated the Act in her personal capacity where she recklessly failed to fulfill the duties the Act and regulations which gave rise to the Committee’s violations in treasurer’s absence); Commission Certification ¶ 2, MUR 5652 (Terrell for Senate) (May 1, 2007) (taking no further action as to the assistant treasurer).

⁷² See 52 U.S.C. § 30109(a)(5)(B), 30109(d) (formerly 2 U.S.C. §§ 437g(a)(5)(B), 437g(d)).

⁷³ 122 Cong. Rec. 12,197, 12,199 (May 3, 1976).

⁷⁴ *United States v. Danielczyk*, ___ F. Supp. 2d ___, 2013 WL 124119, *5 (E.D. Va., Jan. 9, 2013) (quoting *Bryan v. United States*, 524 U.S. 184, 195 & n.23 (1998) (holding that, to establish a violation is willful, government needs to show only that defendant acted with knowledge that conduct was unlawful, not knowledge of specific statutory provision violated)).

⁷⁵ *Id.* (citing jury instructions in *United States v. Edwards*, No. 11-61 (M.D.N.C. 2012), *United States v. Acevedo Vila*, No. 08-36 (D.P.R. 2009), *United States v. Fieger*, No. 07-20414 (E.D. Mich. 2008), and *United States v. Alford*, No. 05-69 (N.D. Fla. 2005)).

1 from which the respondent's unlawful intent reasonably may be inferred.⁷⁶ For example, a
2 person's awareness that an action is prohibited may be inferred from "the elaborate scheme for
3 disguising . . . political contributions."⁷⁷

4 1. ACA and ACPAC Liability

5 A principal is liable vicariously for the acts of its agent committed within the scope of
6 agency.⁷⁸ In prior enforcement actions, the Commission has on that basis found that legal
7 entities such as ACA and ACPAC may have violated the Act as a result of the conduct of their
8 officers or employees.⁷⁹

9 Here, Henke engaged in the conduct that violated the Act within his designated areas of
10 responsibility as a member of ACA's senior executive staff. He testified that he worked for
11 ACA since May 1998 as Controller and became Vice-President of Finance in 2004 or 2005.⁸⁰
12 His "chief responsibility was for internal financial reporting, managing all the finances and the

⁷⁶ Cf. *United States v. Hopkins*, 916 F.2d 207, 213 (5th Cir. 1990) (quoting *United States v. Bordelon*, 871 F.2d 491, 494 (5th Cir. 1989)). *Hopkins* involved a conduit contributions scheme, and the issue before the Fifth Circuit concerned the sufficiency of the evidence supporting the defendants' convictions for conspiracy and false statements under 18 U.S.C. §§ 371 and 1001.

⁷⁷ *Id.* at 214-15. As the *Hopkins* court noted, "It has long been recognized that 'efforts at concealment [may] be reasonably explainable only in terms of motivation to evade' lawful obligations." *Id.* at 214 (quoting *Ingram v. United States*, 360 U.S. 672, 679 (1959)).

⁷⁸ In addition, a principal is liable vicariously for the acts of its agent committed within the scope of that agency. RESTATEMENT (THIRD) OF AGENCY § 7.07; see also *United States v. Sun-Diamond Growers of Cal.*, 138 F.3d 961 (D.C. Cir. 1998) (affirming criminal convictions against Sun-Diamond in connection with a corporate contribution reimbursement scheme where officer hid the scheme from others in corporation but acted to benefit the corporation).

⁷⁹ See, e.g., Factual and Legal Analysis at 7, MUR 6515 (PFFW) (finding reason to believe that a labor union, knowingly and willfully violated 2 U.S.C. §§ 441b and 441f based on the activities of its executive board members); Factual and Legal Analysis, MUR 6143 (Galen Capital) (finding reason to believe that Galen Capital, a corporate entity, knowingly and willfully violated 52 U.S.C. § 30118(a) and 30122 (formerly 2 U.S.C. §§ 441b and 441f based on the activities of its Chair and CEO).

⁸⁰ Henke Dep. at 11:14, 12:9, 13:19-25, 14:1-18. His job responsibilities did not change with his new title. Henke Dep. at 13:19.

1 staff in the accounting area, being the chief lead on the annual financial audit — external audit,
2 responsible for all the budgeting.”⁸¹ In addition, upon the termination of a former employee,
3 Henke became responsible for processing and recording the receipt of contributions in ACPAC’s
4 financial system.⁸² Cerini had assisted Henke in these specific responsibilities.⁸³

5 According to Henke, prior to the termination of Cerini, his only involvement with
6 ACPAC operations was to “print out an internal financial statement, look at the beginning cash
7 on both statements, the FEC report and the financial statement, look at the ending cash, look at
8 the flow-through in the middle, and make sure that those totals balance.”⁸⁴ After Cerini’s
9 termination in April 2010, he volunteered to help oversee the internal auditing process and as
10 such became more involved in Commission reporting issues.⁸⁵ Consequently, Henke had
11 responsibility for managing the financial records for the accounting department as well as the
12 government affairs department in 2010. He had the authority to transfer funds from ACA to
13 ACPAC, and he supervised the staff who he directed to falsify contributions.

14 Henke authorized the \$23,419 transfer from ACA’s corporate account to ACPAC in his
15 capacity as Vice President of Finance for ACA. As noted, Henke claims he authorized the
16 transfer because he was advised by Ray Mularie, a temporary employee, that the funds
17 represented contributions to ACPAC that were mistakenly deposited in ACA’s account.
18 Regardless of his rationale for authorizing the transaction, Henke caused ACA to make a

⁸¹ *Id.* at 15:2-:6.

⁸² *Id.* at 23:10-:25, 24:1-25, 25:1-:25.

⁸³ *Id.* at 24:3-:25, 25:1-:12.

⁸⁴ *Id.* at 28:11-:16.

⁸⁵ *Id.* at 31:1-:25.

1 prohibited and excessive corporate contribution to ACPAC acting within his designated area of
2 responsibility as Vice President of Finance for the corporate entity; moreover, in his designated
3 role as ACPAC's Assistant Treasurer with responsibility for receiving contributions, he also
4 caused ACPAC to accept that prohibited and excessive contribution. He further acted with the
5 same authority on behalf of ACA and ACPAC when he later authorized the return of funds from
6 ACPAC to ACA.

7 Because the record reflects that Henke acted as an agent for the benefit of both ACA and
8 ACPAC when engaging in the conduct that violated the Act on behalf of those entities, the
9 Commission found reason to believe that ACA, first, violated 52 U.S.C. § 30118(a) (formerly
10 2 U.S.C. § 441b(a)) and 11 C.F.R. § 114.2(b)(1) by making a prohibited corporate contribution
11 in the amount of \$23,419; and second, violated 52 U.S.C. § 30122 (formerly 2 U.S.C. § 441f)
12 and 11 C.F.R. § 110.4(b)(1)(i) by making a contribution in the names of others. For the same
13 reasons, the Commission found reason to believe that ACPAC violated 52 U.S.C. § 30118(a) and
14 30122 (formerly 2 U.S.C. §§ 441b and 441f) and 11 C.F.R. §§ 114.2(d) and 110.4(b)(1)(iv) by
15 accepting the prohibited, corporate contribution made in the names of others.

16 In addition to its vicarious liability as principal for Henke's acts as its agent, ACPAC is
17 required to file accurate Commission disclosure reports concerning its receipts and
18 disbursements. It failed to do so in relation to the transfer of funds from ACA to ACPAC and
19 their subsequent return to ACA. Accordingly, the Commission found reason to believe that
20 ACPAC violated 52 U.S.C. § 30104(b) (formerly 2 U.S.C. § 434(b)).

21 As noted, to conceal his unlawful transfer from ACA to ACPAC, Henke directed his
22 subordinates to create false records indicating that eight individual contributors were the source
23 of the funds. Henke claims he did so as a "temporary fix" to account for the transfer in the

1 Committee's disclosure reports, intending that the reports would ultimately be amended and the
2 contributions omitted.⁸⁶ Henke's attempt to conceal the transfer nonetheless reflects that he
3 knew or should have known that his actions were prohibited. And as the agent of ACA and
4 ACPAC acting within the scope of his responsibility, Henke's intent to avoid a known legal duty
5 is imputed by law to the principals on whose behalf he acted.⁸⁷ Although these facts suggest a
6 sufficient basis to support a knowing and willful finding against ACA and ACPAC, other facts
7 counsel against such a finding. Henke affirmatively sought to conceal the existence of the
8 scheme from senior management of ACA, he instructed his staff not to disclose their activities,
9 he caused false entries in ACA and ACPAC records and ledgers to advance the scheme while
10 minimizing the risk of its discovery, and he acted on his sole authority and without the
11 involvement of the Treasurer to make the two transfers between ACA and ACPAC and to file the
12 inaccurate reports with the Commission.⁸⁸ Consequently, the Commission does not make
13 knowing and willful findings as to ACA and ACPAC for their violations of the Act.⁸⁹

⁸⁶ The Commission has no information suggesting that the eight individuals whose names were identified in connection with the falsified contributions received any sort of reimbursement or that, other than Andrew, they were even aware of the activity.

⁸⁷ See RESTATEMENT (THIRD) OF AGENCY § 7.07; see also *United States v. Sun-Diamond Growers of Cal.*, 138 F.3d 961 (D.C. Cir. 1998) (affirming criminal convictions against Sun-Diamond in connection with a corporate contribution reimbursement scheme where officer hid the scheme from others in corporation but acted to benefit the corporation).

⁸⁸ Andrew also testified that Cottingham was not invited to attend the meeting discussing Cerini's thefts and the attendees were instructed by Henke not to discuss the details of the meeting with anyone not in attendance. Andrew Dep. at 29:12-:25, 30:1-:12. Henke claimed that although he did not recall being told not to discuss the matter with Cottingham, he inferred from Cottingham's absence at the Cerini meeting that he should not share the information with her. Henke Dep. at 37:11-:25, 38:1-:8. According to Andrew, she specifically asked Henke afterwards whether Cottingham should be informed about the details of the meeting given her position as treasurer, and Henke replied in the negative. Andrew Dep. at 33:13-:17.

⁸⁹ See Self-Reporting of Campaign Finance Violations (*Sua Sponte* Submissions), 72 Fed. Reg. 16,695, 16,698 (Apr. 5, 2007) (acknowledging that the Commission may "[r]efrain from making a formal finding that a violation was knowing and willful, even where the available information would otherwise support such a finding" if an entity makes a *sua sponte* submission concerning a violation of the Act and cooperates in any ensuing

1 Finally, we note that ACPAC also failed to file accurate disclosure reports as a result of
2 Cerini's embezzlement scheme. The Commission has stated as a matter of policy that it will not
3 seek a monetary penalty against a committee that files inaccurate reports as a result of staff
4 embezzlement so long as the committee had certain internal controls in place at the time of the
5 embezzlement and took certain corrective steps after discovering it.⁹⁰ Here, ACPAC lacked the
6 necessary minimal controls to benefit from the Commission-created safe harbor.⁹¹ Nonetheless,
7 as a matter of prosecutorial discretion, the Commission decided not to pursue the reporting
8 violations relating to Cerini's theft, for several reasons. First, the \$2,950 amount at issue is
9 relatively modest. Second, the Committee referred the theft to the appropriate law enforcement
10 authorities and made a *sua sponte* submission to the Commission. Third, the Committee also
11 amended its reports to reflect the misappropriations and has implemented additional controls to
12 prevent future occurrences. As such, the Commission decided to take no action as to the
13 Committee's failure to file accurate disclosure reports relating to Cerini's theft of its funds.⁹²

investigation of the Commission); *see also* Commission Certification ¶¶ 1-5, MUR 5398 (Lifecare) (Dec. 19, 2003) (finding reason to believe that corporate officers knowingly and willfully violated Act, but not as to the corporate organization's violations); MUR 5187 (Mattel, Inc.) (same).

⁹⁰ See Safe Harbor for Misreporting Due to Embezzlement, 72 Fed. Reg. 16,695 (Apr. 5, 2007).

⁹¹ For example, Cerini processed contributions, deposits, and disbursements and maintained internal bookkeeping for the Committee's account. Submission at 1. The Committee did not timely or consistently reconcile its account. And the Committee had no fraud prevention controls in place for its checking account. *See* Hylden May 16, 2012, E-Mail (attaching ACPAC Policies and Procedures that outlines prior practices and new practices implemented as a result of the embezzlement).

⁹² *See Heckler v. Cheney*, 470 U.S. 821 (1985).